

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

GEORGE AND ANN TYLER,
Appellants,
v
PIERCE COUNTY AND
WASHINGTON STATE
DEPARTMENT OF ECOLOGY
Respondents

SHB No 93-48

FINAL FINDINGS OF FACT.
CONCLUSIONS OF LAW
AND ORDER

On June 25, 1993, George and Ann Tyler ("Tylers") filed a request for review with the Shorelines Hearings Board ("Board") of a decision by Pierce County ("County") to deny a Shoreline Variance Permit ("variance") and "Shoreline Nonconforming Use Permit". The parties stipulated to a request for a continuance in the Board's hearing date to allow time for a possibly related case to be resolved in Pierce County Superior Court. Following the continuance, a hearing was held before the Board on October 27, 1994, at the Board's office in Lacey. Present for the Board were Richard C. Kelley, who presided, Robert V. Jensen, Chairman, and Sverre Bakke. Matthew Sweeney, of Williams, Kastner & Gibbs, represented the Tylers. Jill Guernsey, Deputy Prosecuting Attorney, appeared for the County. Rebecca Todd, who represented Ecology in this matter, did not participate. The proceedings were recorded by Randi Hamilton, of Gene Barker and Associates, Olympia.

Witnesses were sworn and testified. Exhibits were introduced and examined. The arguments of the parties were heard and considered. Based on the foregoing, the Board makes the following

1
2
3 FINDINGS OF FACT

4 I

5 The Tylers own a small house at 9002 Warren Drive N W , on Hale Passage. The house
6 was built in about 1955, and the Tylers purchased it in 1983. The house fronts on the beach,
7 behind a bulkhead, with zero setback from the ordinary high water mark ("OHWM"). It consists
8 of 2 bedrooms and 1 bathroom, and includes a deck which overhangs the bulkhead, an old septic
9 tank, a well, and a garage. The lot is 66 feet wide along the beach and several hundred feet deep,
10 from the water to the road above, for a total area of approximately 33,000 square feet. The slope
11 of the lot varies from steep at some points to nearly flat at others. We find this sort of slope to be
12 characteristic of the properties in the area, and not a unique condition of this site.

13 II

14 The property is defined by the Pierce County Code as within a Rural Residential
15 shoreline designation. Hale Passage is not a Shoreline of Statewide Significance under RCW
16 90.58.030(2)(e).

17 III

18 George Tyler was employed for many years in responsible positions in the Pierce County
19 Department of Public Works. At the time of the Tylers' purchase of the house, he was aware of
20 the Shoreline Management Act, the Pierce County Shoreline Master Program ("PCSMP"), and
21 the general techniques of surveying property and placement of septic tanks, driveways, etc.
22
23
24
25

IV

1 In 1991, the Tylers applied to Pierce County for permission to remodel the existing
2 house. The proposal, in the form before this Board, was to dramatically alter the existing small
3 beach house. The existing 800 square foot structure would be replaced by a 3,000 square foot
4 house on 3 floors, with the footprint expanding by approximately 450 to 500 square feet. The
5 overhanging deck would be removed. The proposed structure would be built in such a way as to
6 incorporate the existing structure, but would be entirely independent of it structurally, and would
7 allow for the owners to remove the present structure entirely, if they were to so choose. We find
8 that the proposed structure is not a remodel of the existing house, but a new house.

9
10 The Tyler's request included a request for a variance from the PCSMP requirement of a
11 50 foot setback from the OHWM. This request was recommended for denial by the County
12 Planning and Land Services Department, and after a hearing was denied by the Hearing
13 Examiner. Upon appeal to the County Council, it was again denied. The County submitted the
14 denial to Ecology, which filed it. The appeal to this Board followed.

V

15
16
17 The best building site on the property is not at the bulkhead, where the present house site,
18 but rather on the first level rise above the beach. This site, however, is no longer easily available,
19 because the Tylers used it for a new septic system, including drainfield and "reserve" area, which
20 they had constructed at a cost of \$13,000 to \$15,000. The Tylers chose the location of the septic
21 system, and were under no State or County compulsion to place it where they did.

22
23 We find that the placement of the septic system where it now is was the voluntary action
24 of the Tylers.

VI

The beach, above the OHWM, in the vicinity of the Tylers' property is mostly developed with older houses, many of them small like that of the Tylers. There was no evidence to conclude that new or expanded house construction has been allowed under the PCSMP at or immediately above the OHWM in the vicinity of the Tylers.

VII

Any conclusion of law deemed to be a finding of fact is adopted as such.

Based on the above findings of fact, the Board makes the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and subject matter of this appeal under RCW 90.58.

II

The Rural Residential shoreline designation under the PCSMP requires a 50 foot setback from the OHWM. PCSMP Use Regulations 20.62.050.

III

PCSMP states the following regarding variances:

It is understood that the regulations may cause unnecessary hardships in particular situations. The property owner must show that if he complies with the provisions he cannot make any reasonable use of the property (emphasis added).

A variance will be granted only after the applicant can demonstrate the following:

A There are conditions or circumstances involved with the particular project that make strict application of the regulations unnecessary or unreasonable for the applicant's proposal

B That granting the variance will not violate, abrogate or ignore the goals, policies or individual environment purposes spelled out in the Master Program

C That no other applicable regulations will be violated, abrogated, or ignored

D That the public health, safety and welfare will not be adversely affected

E That the specific provision or provisions to be relaxed clearly did not foresee or consider the particular situation the applicant is facing

PCSMF 20 72 020

IV

In addition, WAC 173-14-150 requires, *inter alia*, that an applicant for a variance demonstrate

(b) That the hardship is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions

We conclude that the Tylers are not suffering from a unique condition, and that the situation of their building lot is in large part the result of their own actions

V

We conclude that the Tylers have a reasonable use of their property with the existing small house. As a unanimous Washington State Supreme Court observed in Bucchel,

The size, location, and physical attributes of a piece of property are relevant when deciding what is a reasonable use of a particular parcel of land
Buechel v. Department of Ecology, 125 Wn 2d 196 (2009)

VI

The State Supreme Court has underscored the importance of the Board's consideration of the cumulative effects of shoreline development of this type

The Board may consider the cumulative environmental impact of development. Therefore, it is reasonable for the Board to consider what the cumulative effects would be of allowing structures to be built on the shoreline with no setback from the high water line. Buechel v. Department of Ecology, 125 Wn 2d 196 (210)

We conclude that the cumulative impact of allowing the redevelopment of the small houses on this shoreline in the manner proposed by the Tylers would cause adverse effects to the shoreline environment in violation of WAC 173-14-150(c), and that the public interest would suffer a substantial detrimental effect in violation of WAC 173-14-150(c)

VII

We conclude that the Tylers have no hardship. RCW 90.58.100(5) requires the applicant for a variance to show "extraordinary circumstances." A mere desire to build a larger house than the law allows is not a hardship. Regarding the constraints of their lot, they must take responsibility for having chosen a septic site which limited their other options.

VIII

Regarding the specific criteria for variances under the PCSMP, we conclude

A) The circumstances of the Tylers' property are common in the area, and do not make strict application of the regulations unreasonable,

D) The public welfare would be adversely affected by this significant intensification of development without setback from the beach, and

1 E) Given the common occurrence of older small homes on Hale Passage and other Rural
2 Residential environment shorelines in Pierce County, the County must be presumed to have
3 foreseen the situation the Tylers face when the PCSMP was adopted in 1974

4 Based on all of the above, we conclude that the Tylers' proposal does not meet the
5 requirements for a variance under PCSMP 20 72 020

6 IX

7 Pierce County also processed the Tylers' application as an Expansion of a
8 Nonconforming Use Permit application. This type of permit is a feature of the Pierce County
9 land use code which does not appear in the Shoreline Management Act, which states only

10 *(5) Each master program shall contain provisions for permits for*
11 *conditional uses and variances* RCW 90 58 100

12
13 Because there is no authority in the Shoreline Management Act for such a permit, it has
14 no standing under the Act. Approval of such a permit would grant an applicant no right or
15 privilege on the shorelines of the state other than the rights and privileges he or she otherwise
16 enjoyed. This is not to say that Pierce County may not require such an additional permit, as an
17 additional feature of its land use code, it would thus stand in the same relationship to the
18 requirements of the Shoreline Management Act as do local zoning codes. This Board has no
19 jurisdiction to decide anything about any county's land use regulations, other than on the subjects
20 and in the manner provided for in the Act

21
22 In the present case, the fact that the Tylers were denied an Expansion of a
23 Nonconforming Use Permit by the County is irrelevant to this Board, since such a permit is not
24 one of the matters over which the Act gives this Board jurisdiction. At the same time, however,

1 had the County approved an Expansion of a Nonconforming Use Permit without also approving
2 the requested variance, the Expansion of a Nonconforming Use Permit would not have had any
3 effect of authorizing shoreline development This must be the case, because if it were not, a local
4 government would be able to authorize developments otherwise forbidden by its master program
5 without submitting the permits to Ecology for approval

6 X

7 Any finding of fact deemed to be a conclusion of law is adopted as such

8 Based on the above findings of fact and conclusions of law, the Board enter the following


9
10 ORDER

11 Pierce County's denial of a shoreline variance permit, sought by George and Ann Tyler to
12 remodel and enlarge an existing nonconforming house on Hale Passage, is upheld

13 The variance permit is denied

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16 DONE this 23rd day of January, 1995, in Lacey, Washington

17
18 SHORELINES HEARINGS BOARD

19
20 
RICHARD C. KELLEY/Presiding

21
22 
ROBERT V. JENSEN, Chairman

23
24 
SVERRE BAKKE, Member